**UNITED STATES GOVERNMENT**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 29**

SMITHTOWN HEALTH CARE FACILITY
Employer

and Case No. 29-RC-9346

1199 NATIONAL HEALTH AND HUMAN SERVICE EMPLOYEES UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO[1]
Petitioner

and

NATIONAL ORGANIZATION OF INDUSTRIAL TRADE UNIONS
Intervenor[2]

## DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Paul Richman, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned:

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The record reveals that Smithtown Health Care Facility, herein the Employer, a partnership with its principal office and place of business located at 391

[1] The name of the Petitioner appears as amended at the hearing.

North Country Road, Smithtown, New York, has been engaged in the operation of a nursing care facility, specializing in providing long-term health care and rehabilitation to elderly and infirm residents. During the past twelve month period, a period representative of its operation generally, the Employer, in the course and conduct of its operations, received gross revenues in excess of $100,00 and during the same period, the Employer purchased and received materials and supplies valued in excess of $10,000 directly from points located outside the State of New York.

Based on the stipulations of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit consisting of all full-time and regular part-time certified nursing assistants (CNAs) and dietary aides. The Intervenor currently represents a unit consisting of employees in these classifications. Petitioner, however, would include all per diem and part-time employees who work an average of 4 hours per week in the bargaining unit. The Intervenor would exclude all per diem workers and part-timers who work fewer than 15 hours per week.[3] The Employer

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[2] National Organization of Industrial Trade Unions, herein the Intervenor, intervened on the basis of a current collective bargaining agreement covering the employees in the petitioned-for unit.

[3] This position is somewhat inconsistent with the unit description in the Intervenor's current collective bargaining agreement that includes part-timers working in excess of 12 hours per week. Inasmuch as it

concurs with the Petitioner's position that the bargaining unit should include all part-timers and per diem employees who work an average of 4 or more hours per week.

The record reveals that the Employer employs approximately 110 to 120 employees within the classifications as defined in the Intervenor's current collective bargaining agreement. The record further reveals that the Employer has a current roster of 19 per diem CNAs and 11 per diem dietary aides. It appears from Employer's Exhibit 1,[4] that of the 19 per diem CNAs, 14 worked an average of more than 4 hours per week for the thirteen-week period preceding the filing of the instant petition. The exhibit further reveals that all of the per diem dietary aides worked an average in excess of 4 hours per week for the same period. The record further establishes that the per diem employees have the same job duties, work at the same locations and have the same supervision as the full-time and regular part-time employees. It further appears that the per diem employees work alongside admitted unit members while performing their duties and that some per diem employees will and have worked more hours than regular part-timers. Per diem employees also wear the same employee ID badges as conceded unit members.

Per diem employees are paid the same hourly rates as unit members but do not receive any contract benefits, with few exceptions. These exceptions include double time for work on holidays, overtime and shift differential pay for night and evening shift work and work breaks.

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appears from the record that the Employer does not employ part-timers who work less than 2 shifts per week or 15 hours, this discrepancy appears to be of no moment.

[4] The Employer's witness whose testimony provided the foundation for the introduction of this exhibit conceded that the document contained some errors in calculations. My review of this exhibit indicates that these errors do not impact adversely on either the admissibility or value of this document.

As noted above, the Petitioner seeks an election in a unit including all full-time and regular part-time employees and would include all employees including per diems, who work at least 4 hours per week. The Employer agrees that this grouping constitutes an appropriate unit. The Intervenor, while conceding the facts as set forth above, contends that the unit should exclude employees who work fewer than 15 hours per week. In taking this position, the Intervenor relies on the unit description appearing in the most recent collective bargaining agreement. Thus, the conflicting position of the parties raise two inquiries that need to be resolved: (1) Should the bargaining unit include per diems and those employees who work an average of 4 hours per week? and (2) assuming that the inclusion of the employees in dispute is warranted, does the bargaining history wherein such employees were specifically excluded, mandate their exclusion at this time. For the reasons set forth below, I find that the unit sought by the Petitioner, including the per diems, is appropriate, notwithstanding the bargaining history to the contrary.

In Davison-Paxon Co., 185 NLRB 21 (1970), the Board set forth the eligibility formula for on-call employees. The test is two pronged: (1) whether the employees perform unit work; and (2) whether these employees work with sufficient regularity to warrant their inclusion in the unit. In Davison-Paxon, the Board held that on-call employees who work an average of 4 hours per week for the quarter preceding the eligibility date have a sufficient regularity to warrant their inclusion. The Board continues to apply this test, absent special circumstances not present here, in resolving the unit status question of on-call employees. See Trump Taj Mahal Casino Associates, New

Jersey Limited Partnership d/b/a Trump Taj Mahal Casino Resort, 306 NLRB 294 (1992); and Saratoga County Chapter NYSARC, Inc., 314 NLRB No. 108 (1994). A review of the record establishes that the inclusion of per diem employees in the bargaining unit is warranted. It is uncontested that per diem employees perform the same work as unit members, share the same supervision and work alongside unit members in the performance of their duties. The record reveals that the hours worked by per diem employees is, for the most part, substantially in excess of the 4 hour requirement and in many instances, they work hours in excess of those of part-time employees. It also appears that per diems are paid roughly the same wages as unit members and receive additional compensation as do admitted unit members for working holidays and evening and night shifts. Thus, I find that the first prong of the Davison-Paxson test has been met and therefore, as a group, per diem employees are entitled to inclusion in the unit. Whether an individual employee is entitled to unit membership and voting status requires application of the second prong, i.e., the 4 hour test. If a per diem employee works an average of 4 hours per week, he/she will be accorded unit membership. If such an employee has worked an average of 4 hours per week during the quarter preceding the issuance of this decision he/she will be eligible to vote. As discussed below, I find that the bargaining history of this unit wherein per diem employees were excluded form the unit, does not compel a contrary result. Accordingly, the unit description will include per diem CNAs and dietary aides whose hours of employment satisfy the Davison-Paxson formula.

As noted above, the Intervenor and the Employer are parties to a collective bargaining agreement which describes the bargaining unit as limited to the following: all

full-time and regular part-time certified nursing assistants and dietary aides working 12 or more hours per week. The Intervenor contends that the history of bargaining in this unit compels that it be the unit found appropriate for the purposes of this election. The Petitioner and the Employer argue to the contrary. In Carl H. Neuman, M.D. d/b/a Lydia E. Hall Hospital, 227 NLRB 573 (1976), the petitioner sought an election in a unit of registered nurses including graduate nurses. The incumbent union represented a unit of registered nurses. By practice graduate nurses were excluded. Graduate nurses were those nurses who had completed their undergraduate coursework but had not yet been certified by the state for practice as registered nurses. At the time of the filing of the petition there were approximately 120 registered nurses and 15 to 25 graduate nurses. The record in that case established that graduate nurses were hired to perform all the duties of registered nurses, albeit under supervision, and they appeared on the same work schedules and were counted as registered nurses for staffing purposes. In addition, the wages of graduate nurses were comparable to those of registered nurses with limited experience. The Board concluded that given the similarity and interrelationship of their duties, their pay and working conditions, the inclusion of graduate nurses in the larger registered unit was warranted. The Board concluded that to direct an election in a unit limited to registered nurses would constitute "the perpetuation of a fringe defect in the historical unit." Id. at 574. The Board stated that in light of the factors favoring inclusion of the graduate nurses in the unit, it would not adopt an election procedure that was contrary to the Board's principles "merely because of a labor organization's reluctance to represent a small group of employees whose inclusion in the historical unit is so obviously appropriate." Id, at 574.

The factors relied on by the Board in Lydia E. Hall are more compelling in this case. There is no dispute that the per diems perform the identical work alongside current unit members and enjoy the same supervision. In light thereof, the continued exclusion of per diems who meet the Davison-Paxson hours formula is unwarranted. To perpetuate their exclusion under these circumstances would, for all practical purposes, limit the right of these individuals to obtain representation to a separate unit that makes little legal or practical sense. Thus, the uncontroverted evidence establishing a strong and close community of interest of per diems with existing unit members and the Petitioner's desire to go forward in such a unit, clearly outweigh the Intervenor's unwillingness to include CNA and dietary aide per diems in the current unit. The purposes of the Act and the interests of the employees in dispute are best served by proceeding in a unit encompassing all CNAs and dietary aides, including the qualified per diems. Accordingly, I find that following unit appropriate for the purposes of collective bargaining:

> All full-time, regular part-time and per diem Certified Nursing Assistants and dietary aides (Per diem Certified Nursing Assistants and dietary aides eligible to vote includes those employees who have worked an average of 4 hours per week for the 13 week period preceding the issuance of this Decision and Direction of Election) employed by the Employer at its facility at 391 North Country Road, Smithtown, New York, and excluding all other employees, managers, guards and supervisors as defined in the Act.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the eligible employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations.

Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by either 1199 National Health and Human Service Employees Union, Service Employees International Union, AFL-CIO, or National Organization of Industrial Trade Unions or neither.

## LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the

undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before November 1, 1999. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by November 8, 1999.

Dated at Brooklyn, New York, this 25th day of October, 1999.

/s/ Alvin Blyer

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